NO. 22401

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SALVADOR H. PULIDO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

Appellant, SALVADOR H. PULIDO (hereinafter referred to as PULIDO), was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on March 16, 1960. [C.T. 2] [1/] The Indictment contained Nine Counts covering four transfer transactions of heroin and one conspiracy count. The defendant PULIDO was charged in Count Seven of the Indictment with selling approximately 64 grams of heroin to an agent of the Federal Bureau of Narcotics, in Count Eight he was

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1/ Refers to Clerk's Transcript.

charged with receiving, concealing and facilitating the concealment and transportation of this same heroin, and Count Nine alleged a conspiracy for the sale of heroin that involved codefendants Manuel Luna (hereinafter referred to as Luna), Frank Contraras Collins (hereinafter referred to as Collins), PULIDO, and one Gilbert C. Vasquez (hereinafter referred to as Vasquez). [C.T. 8-11] Each of the above named defendants were also charged in the substantive counts for the heroin transaction of February 23, 1960 [C.T. 8-11].

On March 21, 1960, PULIDO was arraigned before the Honorable Thurman Clarke, United States District Judge, and at this time was represented by Elinor Katz, a retained counsel [C.T. 12]. On March 28, 1960, PULIDO, in the presence of Attorney Elinor Katz, entered a plea of not guilty to all counts of the indictment in which he was charged [C.T. 13]. On April 11, 1960, the case was assigned to the Honorable Ernest A. Tolin, United States District Judge, for trial [C.T. 14]. On April 18, 1960, Attorney Katz advised the court that a conflict of interest existed as to the defendant Collins. She was relieved of the responsibility of representing Collins, but did remain as an attorney for the remaining three defendants, PULIDO, Luna and Vasquez [C.T. 15].

On June 7, 1960, Collins, PULIDO, Luna and Vasquez appeared for jury trial before the Honorable Ernest A. Tolin [C.T. 23]. On this date the jury was selected and the trial commenced. In the afternoon of June 7, 1960, out of the presence

of the jury, the defendant Collins through his counsel, John K. Duncan, entered a motion to change his plea, and a plea of guilty was accepted to Count Two of the Indictment [C. T. 23]. The jury trial continued as to the remaining three defendants, PULIDO, Luna and Vasquez [C. T. 31]. On June 16, 1960, the jury returned a verdict finding all defendants guilty of all counts as charged, thereby convicting PULIDO of the crimes alleged in Count Seven, Eight and Nine of the Indictment [C. T. 33].

On June 30, 1960, PULIDO was sentenced to the custody of the Attorney General for a period of 20 years on each of Counts Seven, Eight and Nine, said sentences to run concurrently with each other [C. T. 36].

No notice of appeal was filed in this case. However, pursuant to PULIDO'S motion under Title 28 U. S. C. §2255, leave to appeal the conviction was granted.

The jurisdiction of the District Court was based upon Section 174 of Title 21, United States Code. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

SPECIFICATION OF ERRORS

A. DOES THE PRESENCE OF HEARSAY TESTIMONY IN THE TRIAL RECORD CONSTITUTE REVERSIBLE ERROR WHEN NO OBJECTION WAS MADE TO THE TESTIMONY DURING TRIAL?

B. WAS THE ARREST AND SEARCH OF PULIDO BASED UPON ADEQUATE PROBABLE CAUSE?

III

STATEMENT OF FACTS

The Indictment charged Nine Counts of violations of Title 21, United States Code, Section 174. Counts One through Six alleged that on the dates of January 18, 1960, January 27, 1960, and February 2, 1960, the defendants Luna and Collins sold heroin to an agent of the Federal Bureau of Narcotics [C. T. 2-8]. Counts Seven and Eight of the Indictment alleged that on February 23, 1960, defendants Luna, Collins, Vasquez and PULIDO did possess, conceal and transfer approximately 64 grams of heroin to an agent of the Federal Bureau of Narcotics [C. T. 8-9]. Count Nine of the Indictment alleged a conspiracy to sell approximately 64 grams of heroin and charged that the co-conspirators consisted of defendants Luna, Collins, Vasquez and PULIDO. At the trial of this case, defendant Collins entered a plea of guilty to Count Two of the Indictment [C. T. 23], and the remaining defendants were each convicted on all counts in which they were charged [C. T. 31-33].

Due to the fact that defendant PULIDO was only charged and

convicted for the transaction occurring on February 23, 1960, which included two substantive counts and one conspiracy count alleging dates of the conspiracy from February 21, 1960, to and including February 23, 1960, this statement of facts will be addressed only to the evidence concerning this transaction. Primarily, the Government's evidence turned on the testimony of Agent Maria of the Federal Bureau of Narcotics, who testified concerning negotiations and the actual transfer of approximately 64 grams of heroin from defendant Luna to himself [R.T. 154-57].[2/] The transaction occurred near the Carioca Cafe in Los Angeles [R.T. 157]. On the evening of February 23, 1960, Agent Maria, with accompanying surveillance agents, met the co-defendant Manuel Luna in front of the Carioca Cafe in Los Angeles [R.T. 156]. At this meeting Luna received a package from Collins and in turn gave it to Agent Maria [R.T. 156]. Agent Maria gave Luna approximately $720.00 of Government Monies, having recorded the serial numbers of the bills used to pay for the 64 grams of heroin. These bills were covered with a fluorescent substance that caused a glowing under proper lighting [R.T. 157]. Immediately thereafter Luna was observed proceeding with the codefendant Collins to the Rio Grande Bar located a few doors from the Carioca Cafe [R.T. 262]. As soon as Collins and Luna had entered the bar, they were met by agents from the Federal Bureau of Narcotics, escorted outside of the bar and

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2/ Refers to Reporter's Transcript.

placed under arrest [R.T. 262]. As soon as Luna and Collins were arrested they were taken to a nearby parking lot and searched. It was at this time that the agents discovered that approximately $650.00 of the money was not in Luna or Collins' possession [R.T. 263].

During the time that Luna and Collins were in the bar, Agent Olexa and Stark observed two individuals sitting near the door, watching the arrest of Luna and Collins with apparent intense interest [R.T. 270-71, 383, 385, 397-98]. After the arrest and search of Collins and Luna the agents returned to the bar and discovered that the two individuals who had been sitting by the door were no longer present. Upon placing Luna and Collins in the agent's car, they traveled the general area near the Rio Grande Bar and observed PULIDO and Vasquez walking in a rapid manner. At this time Collins identified these two individuals as being the men who had received the money [R.T. 425]. Based upon the statement of Collins that he had received the heroin from these two individuals, and their observations, the agents placed PULIDO and Vasquez under arrest [R.T. 274-75, 282, 365, 425]. A brief search disclosed the $640 of prerecorded serial numbered monies that had been paid for the narcotics in the possession of PULIDO [R.T. 427].

After placing PULIDO and Vasquez under arrest, they were both interrogated concerning the $640.00 found in the possession of PULIDO. PULIDO told the agents that he had earned this money while working in Tijuana [R.T. 432]. The evidence in this case

established that this was the identical money that had been paid approximately one-half hour earlier to Luna for the 64 grams of heroin [R. T. 571-72, 426-27].

During the trial of this matter Agents Maria and Olexa did testify as to the post-arrest statements of Collins, alleging that PULIDO was one of the individuals involved in this transaction [R. T. 166-68, 282]. After some testimony by Agents Maria and Olexa, Judge Tolin called counsel and defendants to the bench for a discussion out of the hearing of the jury [R. T. 282]. Judge Tolin informed the prosecutor that the post-arrest statements of Collins were hearsay and that he would not allow further inquiry into Collins' statements that implicated PULIDO [R. T. 283]. Prior to Judge Tolin making this ruling, no objection had been raised by defense counsel to the testimony [R. T. 283]. However, at this time defense counsel moved to strike the hearsay testimony of Agent Olexa that had already been admitted [R. T. 284-86]. The Judge refused to grant the motion without some specificity as to exactly what portions of the testimony were to be stricken, i. e., the Judge refused to grant an omnibus motion to strike [R. T. 284-86]. The defense counsel was requested by the court to obtain a transcript and thereby it could be determined what testimony was improper [R. T. 286-87]. The record is void of any indication that the defense counsel did again renew this motion or seek to have any of this testimony stricken.

Subsequent to Judge Tolin's ruling the Assistant United States Attorney attempted to elicit testimony concerning Collins'

post-arrest statements implicating PULIDO. However, the prosecutor's attempt was objected to and no damaging testimony was obtained concerning this matter [R. T. 365]. While making one objection defense counsel Katz specifically declared that if the Assistant United States Attorney continued to attempt to obtain this hearsay testimony a mistrial would be requested [R. T. 422-23]. The record does not reflect any additional attempts to obtain hearsay evidence after this objection by PULIDO'S attorney.

During the trial the former defendant Collins testified and contradicted the testimony of Agents Maria and Olexa by denying that PULIDO had any connection with the narcotics whatsoever [R. T. 518, 523, 525]. The remaining testimony of Collins did coincide with the agents' testimony, by implicating Luna and Vasquez in the transaction [R. T. 503, 510, 516, 547-49].

On June 16, 1960, the jury returned a verdict of guilty to all counts as to all defendants [C. T. 31, 33]. On June 30, 1960, the defendant PULIDO was sentenced to the custody of the Attorney General for a period of 20 years on each count, said counts to run concurrently [C. T. 34].

IV

ARGUMENT

A. THE EXISTENCE OF HEARSAY TESTIMONY IN THE TRIAL DOES NOT CONSTITUTE REVERSIBLE ERROR.

1. THE FAILURE TO OBJECT TO HEARSAY TESTIMONY PRECLUDES AN APPELLANT FROM RAISING THE ISSUE OF THE ADMISSIBILITY OF THAT EVIDENCE ON APPEAL.

The appellant's contention is that Agents Maria and Olexa of the Federal Bureau of Narcotics testified at trial that Collins had told them that PULIDO was one of the men from whom he had obtained the heroin [R. T. 166-68, 274]. Since these statements were made after Collins had been arrested - after the conspiracy had terminated - therefore they would be objectionable as hearsay. However, at no time during the testimony of Maria and Olexa did counsel for PULIDO raise an objection or seek to have the hearsay testimony stricken [R. T. 166-69, 273 - 74]. A review of the transcript reveals that it was Judge Tolin who made the determination that the testimony of Agents Maria and Olexa contained hearsay and that he would not admit any more testimony of that type [R. T. 283]. It was only at this time -- after Agent Olexa had testified -- that counsel for PULIDO attempted to have the hearsay stricken from the record [R. T. 284-86]. Judge Tolin denied the motion to have it stricken on the grounds that there was not sufficient specificity as to what was to be stricken [R. T. 284-86].

The trial judge also instructed counsel for PULIDO to have a transcript of the testimony prepared so that it could be determined exactly what should be stricken, because the agent's testimony did contain a substantial amount of admissible evidence [R. T. 286-87].

It is a well-established principle that when a person fails to make a seasonable objection to testimony at trial he is deemed to have waived his right to raise that question on appeal. As stated in Oleander v. United States, 237 F. 2d 859 (9 Cir. 1956), at 866:

> "The objection on grounds of hearsay, not having been made before the trial court, cannot be urged here [on appeal] as reversible error."

The reason requiring defendant to object to inadmissible evidence in a trial is the necessity of conducting an orderly trial. It is incumbent upon a defendant to object to evidence so that the court can have the opportunity to rule on the matter at the time the evidence is offered. See Feyrer v. United States, 314 F. 2d 110, 112 (9 Cir. 1963), where the defendant contended that certain statements made by an alleged co-conspirator implicating him in the crime were erroneously admitted because the conspiracy had terminated prior to the making of those statements. The Feyrer court held that since the defendant did not object to those statements at the proper time, it was unnecessary for the court to consider whether or not the extra-judicial statements were made subsequent

to the termination of the conspiracy. The same rationale is found in Sekinoff v. United States, 283 Fed. 38, 39 (9 Cir. 1922), where the Ninth Circuit again reiterated that failure to make an objection at trial precludes consideration of this issue on appeal.

Appellant contends that the prosecutor continued to seek testimony concerning Collins' post-arrest statements implicating PULIDO in the crime. [Brief for Appellant at p. 11]. However, the record does show that PULIDO'S counsel did object to this testimony concerning Collins' post-arrest admissions [R. T. 365, 422-24]. The objections of PULIDO'S counsel were ruled upon, and PULIDO'S name was not mentioned [R. T. 365, 424-25]. No further testimony concerning Collins' post-arrest statements was sought after counsel for PULIDO stated that if this type of evidence was to continue to be solicited a mistrial would be requested [R. T. 422-23].

After Judge Tolin had called counsel and the defendants to the bench and instructed the prosecutor that he would no longer tolerate any attempt to elicit Collins' post-arrest statements implicating PULIDO, counsel for PULIDO made a motion to strike the testimony of Agents Maria and Olexa [R. T. 284-86]. However, after some discussion, Judge Tolin denied the motion to strike the testimony stating that he would not grant an omnibus motion and he would require specificity as to which portions were considered objectionable, because the testimony did contain legitimate evidence [R. T. 284-86]. The record fails to show that counsel for PULIDO provided the Judge with a transcript delineating the

objectionable portions of the testimony. As stated in Metcalf v. United States, 195 F. 2d 213 (6 Cir. 1952), at 216:

> "It is well settled that objections to evidence should be timely made when the evidence is offered, and that it is within the discretion of the trial judge to sustain or overrule a motion delayed until the close of the Government's case to strike from the consideration of the jury evidence previously received without objection . . . . "

The courts do repeatedly hold that counsel cannot be permitted to sit idly by and permit a witness to testify with the vague hope that the testimony may help his client and then finding no benefit seek to strike it out of the record. See Marx v. United States, 86 F. 2d 245 (8 Cir. 1936), at 251. It is respectfully submitted that the handling of the hearsay testimony by counsel for PULIDO does fall within the above mentioned rule.

2. THE EXISTENCE OF HEARSAY TESTIMONY IN THE TRIAL DOES NOT CONSTITUTE PLAIN ERROR AND UNDER THE FACTS OF THIS CASE SHOULD BE CONSIDERED HARMLESS ERROR.

The primary thrust of defendant PULIDO'S argument is that the plaintiff continued to press to obtain hearsay evidence implicating PULIDO. The record shows that on several occasions the prosecutor did ask witnesses what Collins said after his arrest [R.T. 284-86, 365]. However, after Judge Tolin, on his own motion, decided that the testimony was inadmissible, counsel for PULIDO commenced to object to the hearsay testimony [R.T. 284-86]. In one situation a partial answer was made wherein Collins identified the two men walking on the street as the two men about whom he had previously spoken [R.T. 365]. However, the name of PULIDO was not used by this witness, nor was the nature of the conversation introduced [R.T. 365]. Furthermore, when the court did sustain objections to this testimony it specifically stated in front of the jury that what Collins said after he was arrested could be used against Collins; but because Collins was no longer on trial, his statements could not be used against anyone else [R.T. 423-424]. These verbal qualifications by the trial judge certainly put the jury on notice that the post-arrest statements of Collins could not be used to incriminate or convict PULIDO.

When Collins was called to the stand by the Government he testified in conformity with the testimony of Agents Maria and Olexa, with the exception of PULIDO'S role in the February 23rd

transaction [R. T. 497]. At the trial he denied that PULIDO had any involvement whatsoever with the narcotics. Now this testimony by Collins was clearly contrary to the statement originally made to Agents Maria and Olexa, wherein PULIDO was identified as one of the individuals who was the source of the heroin. [R. T. 166-68, 274, 282]. Naturally, one may impeach his own witness by the use of a prior contradictory statement when he has been surprised. See Slade v. United States, 267 F. 2d 834 (5 Cir. 1959). The element of surprise primarily consists of a showing that the testimony of the witness deviated from what was a reasonable expectation of the party calling him. See United States v. Kahaner, 317 F. 2d 459 (2 Cir. 1962), cert. den. 375 U.S. 836 (1963). No showing of surprise was made in this case for the simple reason that the prior inconsistent statement was already before the jury through the testimony of Agents Maria and Olexa, and no objection had been lodged to that testimony [R. T. 166-68, 274-282]. There is no way to know or to speculate whether the prosecutor was in fact surprised except to note the major deviation in the testimony that Collins gave from the statements previously given to the agents of the Federal Bureau of Narcotics. Had the showing of surprise been made, then the prior inconsistent statement implicating PULIDO would have been before the jury. While not admissible per se as evidence in the case, it would certainly have been a statement for impeachment and could have been considered in that context by the jury. Because these facts could have been before the jury for impeachment it is respectfully submitted that there is

no prejudicial error in the case by their earlier admission into evidence.

It is pertinent to the consideration of harmless error that the evidence against PULIDO is substantial, irrespective of any hearsay testimony. The evidence against PULIDO was that he had in his possession $640.00 of the money used to purchase the narcotics [R.T. 472]. In explaining his possession of this money PULIDO gave a patently fabricated exculpatory statement claiming that he had earned the money while working in Tijuana, when in fact that money had been paid approximately one-half hour earlier for the acquisition of the heroin [R.T. 171-172, 433-34]. PULIDO'S intense interest in the arrest of Luna and Collins and his rapid walking were also indicative of his guilt. It is respectfully submitted that the existence of hearsay testimony in the trial -- when compared to the remaining evidence against PULIDO -- clearly demonstrates the absence of any error that would warrant a reversal of this conviction.

B. THE ADMISSION OF MONEY TAKEN FROM A DEFENDANT'S PERSON AND THE ADMISSION OF AN EXCULPATORY STATEMENT AS TO THE SOURCE OF THE MONEY INTO EVIDENCE DOES NOT CONSTITUTE REVERSIBLE ERROR WHEN THERE HAS BEEN NO MOTION TO SUPPRESS AND WHEN THE ARREST WAS BASED UPON PROBABLE CAUSE.

Counsel for PULIDO alleges that it was error to admit the money and the exculpatory statement of PULIDO because there did not exist any probable cause to arrest PULIDO. The money was obtained by a search of PULIDO'S person incidental to the arrest [R. T. 427]. Concerning the failure of a defendant to seek a motion to suppress, the court in Gilbert v. United States, 307 F. 2d 322 (9 Cir. 1962), stated:

> "Failure to make objections to evidence either before or at trial precludes consideration of objections thereto on appeal unless good cause for such failure is show." (Id at 325).

There is no showing whatsoever as to why a motion to suppress was not filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, by the defendant at the trial of the instant case. Of course, one obvious reason is that there did exist sufficient probable cause to arrest PULIDO. However, the Appellate Court pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure, may for the first time on appeal notice certain errors when the failure to recognize them would result in a miscarriage of justice and seriously affect the fairness, integrity or public

reputation of the judicial proceedings. See Billeci v. United States, 290 F. 2d 628, 629 (9 Cir. 1961); Smith v. United States, 173 F. 2d 181, 184 (9 Cir. 1949).

In the present case there exists a factual situation where an accomplice, Collins, informs the agents that he no longer has the money received from the transaction and has given it to his connection who he identifies as being PULIDO and Vasquez [R. T. 274, 282]. PULIDO and Vasquez had been observed in the Rio Grande Bar by Agents Stark, Olexa and Gjertsen [R. T. 383, 385, 270-71, 455-57]. They were subsequently observed walking in a rapid manner on the street shortly after the arrest of Collins [R. T. 425, 362]. At this time PULIDO and Vasquez were arrested by the agents of the Federal Bureau of Narcotics and the search was incident to this arrest. It is well-established in the Federal Courts that the uncorroborated testimony of an accomplice is sufficient to convict. See Williams v. United States, 308 F. 2d 664 (9 Cir. 1962); Audet v. United States, 265 F. 2d 837 (9 Cir. 1959), cert. den. 361 U. S. 815 (1960). If the uncorroborated testimony of an accomplice would be sufficient to convict, it would certainly appear to provide a sufficient basis for probable cause to arrest one of the individuals who is pointed out by an accomplice as having been involved in the crime. See Wooten v. United States, 380 F. 2d 230, 232 (5 Cir. 1967).

Appellant argues vigorously that the factual situation and ruling in Castillon v. United States, 298 F. 2d 256 (9 Cir. 1962), is controlling in the instant case. Appellant is mistaken in relying

upon the Castillon case to support any proposition attacking the legality of the arrest and search of PULIDO because of the significant factual differences. In Castillon, ibid., the informant was arrested and provided information about a different and distinct crime. In that case the informant, who had never previously given any information to the police, disclosed to them that he had previously sold narcotics to Castillon and described the place where Castillon resided. However, it was solely based upon this information that the police arrested Castillon, not having any independent knowledge that a crime had even been committed, or who had perpetrated it except for the statement of the informant. In the instant case, the agents knew by their own knowledge that a crime had been committed since Agent Maria had just purchased 2-1/2 ounces of heroin. Furthermore, they were aware that the narcotics had come from a source other than Collins or Luna because a substantial portion of the money paid for the narcotics was no longer in the possession of Luna or Collins [R.T. 263]. It was after obtaining this information that the accomplice, Collins, stated that PULIDO and Vasquez were his connection; that he had given one of them $650.00, and that they were present at the scene of the crime [R.T. 274, 282].

The appellant's contention that his exculpatory statement - whereby he claimed he had earned the money in Tijuana - should have been excluded is premised upon the alleged illegality of PULIDO'S arrest. It is respectfully submitted that this contention is without merit for the identical reasons set forth in this brief concerning the search of PULIDO.

V

CONCLUSION

For the reasons stated in the argument the judgment of the District Court should be affirmed.

Respectfully submitted,

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